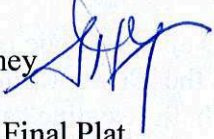




DATE: October 3, 2014

TO: Mayor and City Council

CC: Mark Bernhardson, City Manager; Larry Lee, Director of Community Development; Karl Keel, Director of Public Works; Stephen Hance, Esq.

FROM: Sandra Johnson, City Attorney 

RE: Dwan Bluff Preliminary & Final Plat

This memorandum is an attempt to more fully answer some of the questions posed by the City Council at their September 22, 2014, meeting.

The City Council's Role in Reviewing Plat Applications is Limited

The City's discretion to approve or deny an application for plat approval is far less than its discretion over the issuance of a CUP. If the plat application is consistent with the City's zoning ordinances, it is *presumed* to be consistent with the public health, welfare and safety as well as consonant of the comprehensive plan, and it is *arbitrary, as a matter of law*, to deny a plat that complies with the City's zoning code. *Hurrle v. County of Sherburne ex rel Bd. of Comm'rs*, 594 N.W.2d 246, 250 (Minn. App. 1999); *see also PTL, LLC v. Chisago County Bd. of Comm'rs*, 656 N.W.2d 567, 571 (Minn. App. 2003).

Here, the proposed plat is for a permitted use; hence, the role of the City Council is to determine whether the application conforms to the technical requirements of the ordinance, including whether the plat has the correct setbacks and open-space requirements. The City Council's role is limited to what is essentially a ministerial review of the application. *Chanhassen Estates Residents Assoc. v. City of Chanhassen*, 342 N.W.2d 335 (Minn. 1984).

In contrast, as was the case with Martin Luther Manor, when considering a conditional use permit ("CUP") application, the City Council may base its denial on legally sufficient evidence that the proposed use will be contrary to the public health, welfare or safety. There is no operative presumption that the *conditional use* is inconsistent with health, safety and welfare. In addition, when reviewing a request for rezoning, a City may deny the application based upon an inconsistency with its Comprehensive Plan.

In *PTL*, the Court of Appeals reversed a board's denial of a plat application where the proposal was for a permitted use and conformed to the zoning and subdivision ordinances. *Id.* at 573. The section of the ordinances the board relied upon for denial were mere statements of purpose

set forth in the comprehensive plan (inefficient, poorly designed or incompatible with surrounding land uses) and they were found to be legally insufficient.

If the City Council believes that the connection of long separated stub streets is contrary to the public health, safety and welfare or is inconsistent with the Comprehensive Plan, its option is to amend the applicable zoning ordinances or comprehensive plan; it does not have the legal authority to deny a plat application that meets current official controls and there can be no *post hoc* application of future official controls. *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 174-175 (Minn. 2006).

There is No Conflict with the Comprehensive Plan Posed by the Plat

The application for plat approval meets all City Code requirements and is not in conflict with the Comprehensive Plan. Figure 4.8 of the City's Comprehensive Plan (page 4.25), *Functional Roadway Classification*, highlights both existing and planned "Collector" and "Arterial" roadways. These roadways are the backbone of the City's transportation system and are anticipated to carry the most traffic. In the past, when there were active river crossings at Bloomington Ferry Bridge Road and Normandale Boulevard, motorists used southern east-west roadways, like Overlook Drive, to access these crossings. Accordingly, for many years, the Comprehensive Plan showed a collector street connection on Overlook Drive between France Avenue and Xerxes Avenue. With the closing of these river crossings, the need for south Bloomington east-west road capacity was reduced and the Comprehensive Plan was revised to indicate that a collector street connection on Overlook Drive was no longer needed.

The removal of the Overlook Drive road connection from the Comprehensive Plan as a planned future Capital Infrastructure Improvement in Figure 4.14 (page 4.33) did not have the legal effect of prohibiting a future connection. The fact that: 1) both ends of Overlook Drive were stubbed out rather than finished as cul-de-sacs (as done with permanent dead end streets) evinces the City's anticipation of a future road connection; and 2) the City obtained a partial right-of-way/street easement between the two segments of Overlook Drive also indicates a clear intent to extend the street segments in the future. The only significance of the removal of the connected Overlook Drive from the Comprehensive Plan is that it reflected the fact that the road project no longer met the qualifications for a state-aid road because of the closures of the multiple river crossings.

Moreover, there is no prohibition in either the City Code or Comprehensive Plan against higher volume roadways abutting residential properties or being situated within residential neighborhoods. Many City residential roads are heavily traveled with average daily trips well beyond the credible projections for this future road project.

Table 4.1, *Functional Classification System Criteria and Characteristics*, (page 4.25) under the heading of Vehicles Carried per Day, lists "less than 1,000" for local streets. However, this is a **characteristic** of some local streets, not a specific criteria or requirement that would imply or necessitate a reclassification whenever the vehicles carried per day on a particular street routinely exceeded that number. For that reason, a court would not be able to sustain a denial of

the proposed plat based upon the argument that if Overlook Drive when connected would carry more than 1,000 cars per day such would constitute a conflict with the Comprehensive Plan.

The City has several local streets that carry more than 1,000 cars per day, including Yukon Avenue north of Bloomington Ferry Road, Oregon Avenue between Minnesota Bluffs Drive and 110th Street, 106th Street west of Bloomington Ferry Road, 98th and Upton, and 88th Street between Xerxes and Thomas Avenue, to list a few. Note that traffic counts are not available for all local streets. The Bolton and Menk Traffic Study forecasts 114 cars per day from the development and potentially 464 to 548 trips TOTAL on the segment of Overlook Drive between Xerxes and France Avenues, resulting from changes in neighborhood traffic patterns. There can be no legal or practical presumption that higher traffic levels create a public safety hazard.

Narrow Issue Before the City Council

The design of the ensuing road project is a separate matter that will follow plat approval as a subsequent step when ordering the road project. The issue presently before the City Council is limited to the adequacy of the road to support the traffic generated by the twelve new homes proposed by the plat. The specific findings are found in City Code §22.05(d), as follows:

(d) **Findings.** The following findings must be made prior to approval of a preliminary plat:

- (1) The plat is not in conflict with the Comprehensive Plan – *there is no conflict*;
- (2) The plat is not in conflict with any adopted District Plan for the area – *there is not District Plan for the area*;
- (3) The plat is not in conflict with City Code provisions – *there is no conflict, it's Code compliant*;
- (4) The plat does not conflict with existing easements – *it does not conflict as planned*;
- (5) There is adequate public infrastructure (roads, utilities, storm water systems, emergency services, schools, etc.) to support the additional development potential created by the plat - .
- (6) The plat design mitigates potential negative impacts on the environment, including but not limited to topography; steep slopes; trees; vegetation; naturally occurring lakes, ponds, rivers and streams; susceptibility of the site to erosion, sedimentation or flooding; drainage; and stormwater storage needs – *a petition and waiver for additional infrastructure is required*;
- (7) The plat will not be detrimental to the public health, safety or welfare - *analyzed below*; and
- (8) The plat is not in conflict with an approved development plan or plat – *it is consistent*.

The issue of the proposed plat's general compatibility with the public health, safety and welfare is not a legitimate issue where, as here, the plat conforms to the standards of the City Code.

While Bloomington City Code at §22.05 (d) (7) requires a finding that the plat will not be detrimental to the public health, safety and welfare, the City Council's analysis of this issue is limited by the context of the matter under consideration – property line changes. The

implications of property line changes for a permitted use is limited to an examination of the impacts of the new lots on easements, infrastructure, and environmental impacts caused by the design. Section 22.05 (d) (7) is far too vague to alone serve as a basis for denial of any plat. Under Minnesota case law regulatory standards must be sufficiently precise to ensure the application of objective standards to all similarly situated property, to adequately inform landowners of the requirements they must satisfy to gain subdivision approval and to allow a reviewing court to evaluate noncompliance. *PTL, supra* at 573.

The road design and potential traffic calming design features are not presently before the City Council. The issue, if considered at all at this point in the process, should be confined to whether or not the credible evidence on traffic volumes and street configuration identify a clear threat to the public health, safety and welfare that is incapable of being adequately mitigated in the future road design process. Where, as here, the planned road connection meets City Code requirements, as well as state statutes and rules, a finding of clear threat would be highly unlikely.

In general, traffic volumes are not presumed to create a danger and there are no City Code or Comprehensive Plan provisions that prohibit high traffic volumes in residential neighborhoods. In the Martin Luther Manor case, the denial of a CUP for a new use that would undeniably increase traffic to an existing 'high traffic generator', was based on the Comprehensive Plan requirement that high traffic generating uses be located adjacent to an arterial or collector street. The addition of twelve new homes will not be a significant traffic generator. So even if the road connection would potentially generate between 750 and 2400 trips, as speculated in the September 17, 2014, memorandum from Ronnie Williams and Perry Ryan on behalf of the resident opponents, such would NOT serve as a basis for denial of the plat. Even Messrs. Williams and Ryan concluded that their estimated traffic volumes could be addressed with traffic calming measures, and did not recommend denial of the connection.

When Resident Concerns Can Serve, in Part, As a Basis for Denial

Assuming *arguendo* that the future impact of the road connection is properly before the City Council at this juncture, the issue is limited to the following:

Whether or not there is admissible evidence in a court of law that the future road connection is significantly likely to create a clear danger to the public health, safety and welfare that is incapable of being adequately mitigated in the future road design process.

Moreover, there are strict limitations on the nature and sufficiency of the factual basis for finding a code compliant plat for a permitted use contrary to health and safety. Generally speaking, neighborhood opposition is viewed very skeptically by reviewing courts and unless based on concrete facts it cannot be taken into consideration at all.

The leading case to date on when neighbors' opposition to a project may be taken into consideration by a City Council in the context of a development application is *SuperAmerica Group, Inc. v. City of Little Canada*, 539 N.W.2d 264 (Minn. App. 1995), *review denied* Jan. 5, 1996. In that case SuperAmerica applied for a conditional use permit to construct a gas station

and convenience store. The undisputed evidence, supported by both the City's independent traffic consultant's study and the SuperAmerica traffic study, was that:

- The site was at an intersection already experiencing significant traffic congestion;
- Making a left turn from the site was extremely difficult and often impossible;
- Many vehicles had to wait two cycles at the stoplight before completing a turn;
- The proposed use would cause three times as much traffic as the existing restaurant use (from 800 trips to 2500); and
- The existing use closes at 3:00 p.m. so there is no data on peak hour traffic.

The resident testimony was directly supported by the expert testimony and reports and it was not speculative; Residents detailed their experiences with the existing congestion at the intersection.

The basis for denial was not a vague reference to the comprehensive plan, but a specific restriction of commercial development at street intersections and the prevention of overcrowding and over intensification of land use. This is a nearly identical fact pattern to the Martin Luther Manor case, to wit: concrete testimony based on real data, supported by expert reports and the denial was based on a specific provision within the official controls, not a vague statement.

Had the expert reports not supported the resident testimony in opposition, the City would have had to approve the application. Also, had there not been a specific restriction in the comprehensive plan, it is likely that the denial would not have been upheld by the courts.

In contrast, where the resident opposition stands alone and is inconsistent with the reports of experts, a denial of a proposed development will be reversed by the courts. The Minnesota Supreme Court in *C.R. Investments, Inc. v. Village of Shoreview*, 304 N.W.2d 320 (Minn. 1981), overturned the village council's denial of a special use permit for residential development and ordered the permit be issued under the following facts:

- The proposed residential development of 19 quad-homes was a permitted special use under the zoning;
- Both the city planner and city attorney interpreted the ordinance as permitting the proposed development and not posing any adverse impact on the public health, safety or welfare;
- Residents opposing the development expressed objections to it based on their belief that the development would not be in harmony with the area, result in increased traffic, and detrimental to the wildlife in the area;
- The county engineering department determined that the development would not result in a traffic problem for the area;
- The stated basis for denial by the planning commission was 'no sufficient buffer, plat incompatible in orientation, and not consistent with the general intent of the comprehensive plan'; and
- The city council denied based upon the findings of the planning commission and several aesthetic concerns.

The court ruled that the basis for rejection of the development was unreasonably vague and without a substantial relationship to the health, safety and welfare of the public. The generalized

concerns about traffic expressed by the residents in opposition to the development could not rebut the expert testimony of the county traffic engineer. Generally, where a use is permitted under the zoning code, it is presumptively consistent with the public health, safety and welfare.

Similarly, the court overturned a CUP denial in *Chanhassen Estates Residents Assoc. v. City of Chanhassen*, 342 N.W.2d 335 (Minn. 1984) once again finding that the denial must be based on something more concrete than neighborhood opposition and expressions of concern for the public safety and welfare based upon speculation about potential traffic hazards. The speculative public testimony, the court ruled, was insufficient to rebut the city engineer's testimony that the intersection could handle the traffic. *Id.* at 340.

In conclusion, resident testimony can serve, in part, as a basis for denial only under the following facts:

- The opposition testimony is not speculative, but based on concrete data;
- There are no expert reports that contradict the resident testimony;
- The basis for denial requested by the resident testimony rests on a specific restriction within the official controls, not vague references to the principals and goals set forth in the official controls.

Thus, unless the residents produce a professional traffic analysis by a qualified Minnesota traffic engineer supporting their speculation about excessive traffic that the City Council specifically finds is more accurate and probative than the City's traffic analysis prepared by an independent consultant, their testimony will not be accepted as evidentiary support for denial of the plat in a court of law.

Precedent Set by a Denial of a Code-Compliant Plat Based on Speculated Traffic Volumes

The fact that this application comes before the City Council decades after the hundreds of other similar plat approvals, as Bloomington transformed from farmland to a residential suburb, should not impact the manner in which it is analyzed or its outcome. The goal of the law is to give fair and equal treatment to similarly situated property owners. If the City had applied the arguments made by the resident opponents- that subdivisions increasing traffic in residential areas result in a clear danger to the neighborhood and are subject to denial, most of Bloomington would today remain farmland, including the area adjacent to Overlook Drive.

Any denial of this code compliant plat application based on the current record would also establish a new standard for the City whereby any future plat application resulting in a similar increase in traffic would be subject to denial. Whether or not the current property owner sues the City over the proposed denial, it is likely that a similarly situated future property owner facing denial would initiate suit. The over-arching theme of the Minnesota appellate courts is that regulatory standards must be sufficiently precise to ensure the application of objective standards to all similarly situated property, to adequately inform landowners of the requirements they must satisfy to gain subdivision approval and to allow a reviewing court to evaluate noncompliance.

The Step-by-Step Process Should the Plat be Approved

Should the plat be approved by the City Council, the property owner would be required to serve the City with a petition and waiver for the construction of the necessary public improvements, including the road. This is required prior to filing the plat with Hennepin County. Once the petition is received, a more detailed roadway plan will be prepared that will resolve issues like street width and striping, sidewalk/trail location and design, traffic calming features and landscaping. The City, as is the case with all public improvements, has considerable discretion in approving the final design and construction of the street and associated utilities.

Generally, by the petition the property owner is requesting the City to design and construct the road project and agreeing to the assessment therefor. There must also be easements provided to the City for sidewalks/ bikeways and a scenic easement for private land below the 800 foot elevation. Prior to the issuance of any grading permit, the property owner must prepare and provide the City with grading, drainage, utility, erosion control, traffic control and haul route plans that meets the approval of the City Engineer.

Stormwater and surface water management plans must be prepared and meet the approval of the City Engineer. The watershed district must also review the plans. An erosion control bond must be provided, as well as a pollutant discharge elimination system construction site permit and a storm water pollution prevention plan. Prior to the City issuing a building permit, sewer availability charges must be paid and as-builts of the completed pond grading provided to and approved by the City Engineer. Many other ongoing conditions and code requirements will apply to the construction of the homes.

The City will design and build the roadway. The City Engineering department has many options to incorporate now, and plan for future, design features that will effectively mitigate any dangers that might result from an increase in traffic. Some of these are described in the report of Perry Ryan, on behalf of the resident opponents to the project. There are other design features that could also be considered. All of these design elements are part of subsequent steps in the approval process and are not presently before the City Council.

Finally, public safety experts consider through streets to provide for greater resident safety by facilitating better emergency vehicle access to homes. In this neighborhood the connection would allow direct emergency access to the neighborhood from multiple fire stations and other emergency vehicle access from both directions.

Staff Communication with the Developer and the Attorney for the Residents

Staff has initiated conversations with the developer, Peter Jarvis, who has indicated that, contrary to the representations of the neighborhood, the owners of the property to be developed would not be willing to agree to the neighborhood's alternative design.

Engineering has invited the resident's consultant, Perry Ryan, to discuss his study and conclusions and are awaiting his response.

I have been in contact with the attorney representing the residents, Stephen Hance, and have shared with him my concerns about the City having an adequate legal basis upon which to deny the plat application and much of the research and analysis set forth in this memorandum. He advised me that he would attempt to make contact with the developer's attorney to see if he could convince the property owner to look at the alternative design preferred by the residents.

Furthermore, to maintain public transparency and accountability relative to the processing of this application, this legal memorandum has been classified as public data.

Conclusion

Even if the connection of Overlook Drive results in a significant increase in traffic volumes, such will not serve as an adequate basis to deny approval of the plat under the existing official controls of the City. At each step of the process City staff will take great care to mitigate any reasonably foreseeable danger to the public health, safety and welfare, just as has been done during the years when Bloomington transformed from farmland to suburban community.